

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-147

In the Matter of)

Request for Extension of the Sunset Date of)
The Structural, Non-Discrimination, and Other)
Behavioral Safeguards Governing Bell)
Operating Company Provision of In-Region,)
Inter-LATA Information Services)

COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel, hereby submits the following comments in support of the Request of the Commercial Internet eXchange Association ("CIX") and the Information Technology Association of America ("ITAA") for an extension, to February 8, 2002, of the sunset date for the safeguards on Bell Operating Company ("BOC") provision of in-region, interLATA information services contained in Sections 272(b), (c), (d) and (g) of the Telecommunications Act of 1996.² As CIX and ITAA demonstrate, sufficient competition has not yet developed for market forces alone to constrain BOC anticompetitive behavior toward potential competitors seeking to provide an alternative

¹ A national trade association, TRA represents more than 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry, and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers as well.

² 47 U.S.C. § 272(b), (c), (d), (g).

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source for the satisfaction of consumer information services needs. The safeguards set forth in Section 272(b), (c), (d) and (g) thus retain their vitality and the Commission should exercise its authority to extend the effectiveness of those safeguards as requested by CIX and ITAA in order that competitive forces, which may eventually negate the need for those safeguards, may have a realistic opportunity to emerge.

Through the instant request, CIX and ITAA ask the Commission to act to prevent the sunseting of the structural separation and transactional requirements, nondiscrimination safeguards, biennial audit requirements and joint marketing restrictions contained in Section 272(b), (c), (d) and (g) of the Telecommunications Act of 1996³ as those restrictions apply to BOC offerings of in-region, interLATA information services.⁴ Absent Commission action, those safeguards, which remain critical to the ability of competing service providers to obtain services from BOCs on a nondiscriminatory basis and which exist to prevent BOCs from preferring their affiliates to the detriment of competitive providers, will expire in approximately two months' time.

In drafting the Telecommunications Act, Congress recognized that, with respect to BOC activities relating to manufacturing activities, origination of interLATA telecommunications services⁵ and interLATA information services, certain precautions

³ Id.

⁴ While similar restrictions apply to BOC provision of manufacturing activities and the majority of interLATA telecommunications services, pursuant to § 272(f)(1), such restrictions will not "sunset" for another three years, at a minimum. The structural separation and other safeguards addressed herein do not apply to electronic publishing or alarm monitoring services. See 47 U.S.C. § 272(a)(2)(C).

⁵ Incidental, out-of-region, or previously authorized activities are not subject to the restrictions discussed herein.

were called for in order to limit incentives for those entities to engage in anticompetitive behavior toward their potential competitors during the period of time required for market forces sufficiently strong to act as a deterrent to anticompetitive behavior to emerge. To that end, Congress specifically established the structural separation and other safeguards set forth in Section 272 of the Telecommunications Act.

Most importantly, a BOC may offer in-region, interLATA information services only through a separate subsidiary, which is itself subject to a number of additional obligations. The obligations of that separate subsidiary include the obligation to operate independently from the BOC,⁶ to maintain separate books of account,⁷ to have separate officers, directors and employees from the BOC with which it is affiliated,⁸ to refrain from entering into credit arrangements which would permit a creditor recourse to the assets of the BOC,⁹ and critically, to conduct all transactions with the affiliated BOC on an arm's length basis "with any such transactions reduced to writing and available for public inspection."¹⁰ For its part, the BOC, when dealing with its affiliate, is prevented from "discriminat[ing] between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the

⁶ 47 U.S.C. § 272(b)(1).

⁷ 47 U.S.C. § 272(b)(2).

⁸ 47 U.S.C. § 282(b)(3).

⁹ 47 U.S. C. § 272(b)(4).

¹⁰ 47 U.S.C. § 272(b)(5).

establishment of standards”¹¹ and must account for all affiliate transactions “in accordance with accounting principles designated or approved by the Commission.”¹²

Congress was cognizant of the fact that BOCs would retain the ability to inappropriately influence market forces even after opening their markets fully to competition.¹³ Thus, Section 272 sets the minimum effective period for the separate affiliate and structural separation safeguards significantly beyond the point where BOC markets could be expected to be fully open to competition. For manufacturing activities and the provision of in-region, interLATA long distance services, that initial time period will not expire until “3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d)”.¹⁴ For information services, the minimum initial time period has been set at “4 years after the date of enactment of the Telecommunications Act of 1996”.¹⁵ Very importantly, however, because it knew that only actual market experience would dictate when market forces would be sufficiently developed to warrant

¹¹ 47 U.S.C. § 272(c)(1).

¹² 47 U.S.C. § 272(c)(2).

¹³ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, ¶ 9 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon. on remand* 12 FCC Rcd. 15756 (1997), *aff’d sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997). (“In enacting section 272, Congress recognized that the local exchange market will not be fully competitive immediately upon its opening. Congress, therefore, imposed in section 272 a series of separate affiliate requirements applicable to the BOCs’ provision of certain new services and their engagement in certain new activities. . . designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting, while still giving consumers the benefit of competition.”)

¹⁴ 47 U.S.C. § 272(f)(1).

¹⁵ 47 U.S.C. § 282(f)(2).

elimination of the safeguards, Congress specifically endowed the Commission with the ability to extend those initial deadlines as appropriate, providing that the above-described sunset dates would apply “unless the Commission extends such [3- or 4-year] period by rule or order.”¹⁶

The Commission’s determination of whether the Section 272 safeguards may safely be lifted must turn on the presence (or lack thereof) of competition in BOC markets. There is ample evidence to support the conclusion that sufficient competition to warrant sunset of these safeguards has not yet emerged. In fashioning the straightforward requirements which a BOC must demonstrate in order to gain in-region, interLATA authority pursuant to Section 271, Congress must surely not have contemplated that several years would pass before any BOC would be capable of demonstrating the sufficient openness of its market(s) to warrant grant of such authority. However, almost four years after passage of the Telecommunications Act, no BOC has been able to satisfy the conditions precedent to the determination of a competitive market in even a single state. Congress did contemplate, however, that even after a BOC had attained such a milestone, the structural separation requirements of Section 272 would continue to play an important role in constraining unfair BOC activity for a minimum of three years. As noted above, the safeguards embodied in Section 272(f)(1) are scheduled to remain effective for more than another three years.

It is unclear whether Congress, in setting the Section 272(f)(1) and (f)(2) minimum effective periods, held the two time frames reasonably equivalent in estimating the likely amount of time required for sufficient competition to take hold to render the

¹⁶ 47 U.S.C. §§ 272(f)(1), 272(f)(2).

safeguards no longer necessary. What is clear, however, is that the BOCs' continuing overwhelming presence within their respective service areas virtually ensures that all competitors, including providers of information services, must continue to deal with the BOC to obtain access to essential services and/or facilities. Thus, even putting aside the examples provided by CIX and ITAA which demonstrate the anticompetitive circumstances facing information service providers,¹⁷ a dearth of competition in a BOC's local service area generally would lend support to the proposition that insufficient competition exists which would justify sunset of the Section 272 safeguards for any of the services delineated in Section 272(a)(2), including information services. Presently, no BOC has succeeded in satisfying the dictates of Section 271, an element of which is a demonstration that the BOC has fully implemented the structural separation and other safeguards set forth in Section 272, for even a single state within its service area. This state of affairs provides persuasive evidence that competition sufficient to rein in potential BOC anticompetitive practices does not yet exist. Removal in approximately two months of safeguards specifically enacted to guard against the ability of BOCs to act anticompetitively is therefore inappropriate.

As CIX and ITAA demonstrate, even with the Section 272 safeguards in place, competitive providers of information services are encountering anticompetitive tactics from BOCs. The experience of TRA members echoes the competitive concerns raised by CIX and ITAA. In particular, inequitable treatment from BOCs constitutes a significant problem for new entrants seeking to bring advanced telecommunications services to consumers, a goal which the Commission has been affirmatively directed to

¹⁷ See Request of CIX and ITAA at 9-11.

promote.¹⁸ Competitive local exchange carriers (“LECs”) are experiencing this unequal treatment in a competitively critical area: attempts to obtain from BOCs the DSL-conditioned lines necessary to the provision of broadband services to consumers.

Required in most cases to process orders utilizing the incumbent’s manual ordering systems, which are insufficient to handle even the current demand for competitive DSL services, competitive carriers are unable to timely determine whether a particular loop is capable of supporting DSL-based services (and is not assisted by the BOC in obtaining this information), although the information remains readily available to the BOC.¹⁹ The inability to determine the DSL capability of a particular line then leads to unnecessarily elevated levels of BOC order rejections, requiring the competitive LEC to negotiate the time-consuming ordering process again while the consumer waits, sometimes patiently, sometimes not.²⁰ For these reasons, the Commission has held, “an incumbent LEC does not meet the nondiscrimination requirement if it has the capability electronically to identify xDSL-capable loops, either on an individual basis or for an entire central office, while competing providers are relegated to a slower and more cumbersome process to obtain that information.”²¹

¹⁸ Pub. Law No. 104-104, Title VII, § 706, reproduced in the notes under 47 U.S.C. § 157.

¹⁹ While certain BOCs have advanced beyond the stage of requiring manual processing of orders by competitors, the problems described inexplicably continue to arise.

²⁰ This problem is exacerbated by the fact that, unlike the BOC’s retail customers, competitive LECs do not receive immediate order confirmation and installation commitments but rather, must frequently wait a number of days for the information, further adding to consumer frustration.

²¹ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order and Notice of Proposed Rulemaking), 12 FCC Rcd. 24012, ¶ 48 (1998).

Additionally, competitive providers of broadband services have come to expect BOC provisioning delays, and from certain BOCs, the outright refusal to provide DSL-conditioned lines. Frequently, delivery dates are missed by a significant number of days (or weeks), and it is not uncommon for delivered loops to be improperly identified or delivered to the wrong location. Obviously, the inability to provision DSL lines to customers when promised reflects adversely on a competitive LEC, leading consumers to question, through no fault of the carrier, whether the competitive provider can provide the service on a comparable basis to the BOC. As the Commission has stated, it is imperative that "competitive carriers are able to enter the advanced services market by providing to consumers the same quality of service offerings provided by the incumbent LECs."²² This is certainly not the case when provisioning delays for competitive carriers significantly exceed the provisioning time frame within which the BOC provides DSL arrangements to the consumer or provisions a DSL-conditioned loop to its affiliate.

The premise underlying the Section 272 structural separation and other safeguards is that, while a BOC should not be unnecessarily hindered in its pursuit of competitive opportunities, neither should it be permitted to make inappropriate use of its existing market presence to hinder the ability of its competitors to provide a similar service. The Commission remains rightfully concerned that broadband services should be deployed in a rapid fashion to all consumers. Members of CIX and ITAA, as well as many of TRA's members are attempting to bring such services to consumers. Sunsetting the Section 272 safeguards now, while such companies are still encountering the

²² Deployment of Wireline Services Offering Advanced Telecommunications Capabilities (Second Report and Order), CC Docket No. 98-147, FCC 99-330, ¶ 20 (released November 9, 1999).

competitive difficulties described above, will severely limit both their ability to offer these services on a broad scale and their ability to aid in the eventual development of the market forces which will allow competitive considerations alone – that is, without the necessity of structural and other anticompetitive safeguards – to sufficiently constrain anticompetitive behavior. Accordingly, the Commission should take action as contemplated by Section 272(f)(2) to extend the effectiveness of the Section 272 information services safeguards until February 8, 2002, and thereafter to reassess the advisability of allowing those safeguards to sunset based upon the existence and degree of actual competition at that time.

By reason of the foregoing, TRA urges the Commission to grant the request of CIX and ITAA, extending until February 8, 2002, the sunset date of the BOC in-region, interLATA provision of information services safeguards contained in Sections 272(b), (c), (d) and (g) of the Telecommunications Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Catherine M. Hannan, do hereby certify that a true and correct copy of the foregoing Comments of the Telecommunications Resellers Association has been served by First Class mail, postage prepaid, this 17th day of December, 1999, on the following:

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